

3030.

APPROVAL, BONDS OF VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY,
\$90,300.00.

COLUMBUS, OHIO, December 22, 1925.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

3031.

APPROVAL, BONDS OF LAKE COUNTY, \$7,464.17.

COLUMBUS, OHIO, December 22, 1925.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

3032.

QUAIL BEING A NON-GAME BIRD CANNOT LEGALLY BE POSSESSED
OR TRANSPORTED, EITHER DEAD OR ALIVE, IN THIS STATE.

SYLLABUS:

Under the terms of Section 1408, General Code, no person may catch, kill, injure, pursue or have in possession, either dead or alive, at any time, or purchase, expose for sale, transport, or ship to a point within or a point without the state, any wild bird other than a game bird. Quail or Bob White being defined as a non-game bird in Section 1390 of the General Code, falls within the restrictive provisions of Section 1408 of the General Code. Residents of Ohio returning from a hunting trip in another state with game permitted licensed non-residents in that state to be taken from said state, on entering the confines of this state with quail, are liable to prosecution for the transportation thereof, although such quail were lawfully taken by residents of Ohio under a non-resident license outside of this state.

COLUMBUS, OHIO, December 22, 1925.

HON. D. C. THOMPSON, *Chief, Department of Agriculture, Division of Fish and Game, Columbus, Ohio.*

DEAR SIR:—Your request for an opinion is stated as follows:

“Some few days ago I took up with your Mr. W. the matter as to whether parties purchasing non-resident licenses in other states to hunt quail, would be allowed to bring the quail back to Ohio without violating the Fish and Game Laws of Ohio.”

Section 1391 of the General Code provides:

“Ownership, Restrictions, Prohibitions. The ownership of, and the title to all fish, wild birds and quadrupeds in the state of Ohio, not confined and

held by private ownership, legally acquired, is hereby declared to be in the state, which holds it in trust for the benefit of all the people, and only in accordance with the terms and provisions of this act shall individual possession be obtained. No person shall at any time of the year take in any manner, number or quantity, fish, wild quadrupeds or birds protected by law, or buy, sell, offer or expose for sale, the same or any part thereof, transport or have the same in possession, except as permitted by this act; and this prohibition shall be construed as part of each permissive section or part thereof. * * **

The prohibitive provisions of the above general section by its express statement must be read with each permissive section or part thereof of the Game Code. The section would apply, of course only to fish and game, in the State of Ohio even if it did not so state. It contains an exception to the application of its provisions in favor of "fish, wild birds and quadrupeds in the State of Ohio confined and held by private ownership legally acquired, * * **" indicating that a property right may be acquired in "fish, wild birds and quadrupeds" which property right is declared to be generally in the state "for the benefit of all the people."

This section prohibits taking "at any time in the year, in any manner, number or quantity, fish, birds, etc.," except as permitted by this act. Act means the Game Code.

The Game Code defines and regulates both game and non-game animals. Quail is a non-game bird and may not be taken, possessed or transported, nor can it be bought, sold, offered for sale or transported anywhere in this state. In support of this statement Section 1393 of the General Code, in part says:

"* * * Each bird or squirrel killed, taken, had in possession, received for transportation, or transported contrary to the provisions of this section shall constitute a separate offense. The reception by any person within this state of such bird or animal for shipment to a point without the state, shall be prima facie evidence that they were killed within the state for the purpose of conveying them beyond the limits thereof. Provided, however, that such animals if legally taken by a non-resident, may be transported by him from a point within the state to a point out of the state, if the same shall be accompanied by the actual owner thereof, and the said owner shall have first procured a non-resident hunting and trapping license. The prohibition of this section shall not apply to a common carrier into whose possession any of the birds mentioned in this act or any squirrels have come for transportation in the regular course of business, while such birds or squirrels are in transit through this state from the point without, where the killing thereof is lawful."

Your question concerns the transportation of quail in this state since it refers to those Ohio residents who are returning from a hunting trip in another state where quail is a game animal. Section 1393 of the General Code supra, evidently refers only to Ohio game animals in which class quail is not placed by the definition found in Section 1390 of the General Code, which in part reads:

"* * * Non-game birds: * * * quail or Bob White * * * and all other wild birds not included in the term 'game birds' * * *."

Quail being a non-game bird the provisions of the Game Code relating to taking, possession and transportation, buying and selling, does not apply to them.

In *Roth vs. State*, 51 O. S. 209, it is held to be an offense under R. S. 6964 of the General Code to sell quail in this state, except between November 10th and December 15th, although such quail were taken outside of the state and in a place where it was

lawful to kill them. Section 6964 R. S. was in force when quail in this state were game birds and at a time when the open season was from November 10th to December 15th. This section has since been repealed and quail have been taken out of the class of game birds and reclassified as a non-game bird.

If we apply the principle of the Roth Case supra, quail cannot now be lawfully sold, possessed or transported in this state for the reason that while this case recognizes the selling of them during the open season in Ohio, the present provisions of the Game Code now make them a non-game bird for which no open season exists.

Section 1394 of the General Code forbids the sale of squirrels and of birds "except as permitted duly authorized game breeders" and it reads in part as follows:

"No person within this state shall buy, sell, expose for sale, offer for sale, or have in possession for any such purpose, any of the birds named in this act (G. C., Sections 1390 and 1454), except as permitted duly authorized game breeders, or any squirrels, whether killed within or without the state, or take, catch, kill or pursue such bird or squirrel, for the purpose of sale within or without the state. Each bird or squirrel bought, sold, exposed for sale, offered for sale, or had in possession for any such purpose, and each bird or squirrel taken, caught or killed contrary to the provisions of this section shall constitute a separate offense."

The exception in favor of game breeders who may sell and transport certain game birds does not include quail.

Section 1434 of the General Code, in part, provides:

"* * * The license granted hereunder shall entitle a non-resident to take with him from this state game animals killed by him not to exceed twenty-five of one kind or twenty-five in the aggregate of all kinds, but he shall not take with him or transport from the state any game bird killed by him or in his possession by gift or purchase. Each game bird so transported shall constitute a separate offense."

The license referred to in this section concerns only game birds and animals and cannot refer to quail. Ohio residents returning from a hunting trip in another state where quail is a game bird and where they may, when properly licensed, lawfully take the same, when they have come into this state, having such quail in their possession, carrying them to their homes, they are doing so in violation of the Ohio Game Code.

Section 1408 of the General Code provides;

"No person shall catch, kill, injure, pursue, or have in possession, either dead or alive, at any time, or purchase, expose for sale, transport or ship to a point within the state, or receive or deliver for transportation any wild bird other than a game bird, nor shall any part of the plumage, skin or body be had in possession, except as specifically permitted by this act, * * *"

In view of the provisions of Section 1408 and other sections herein referred to, it seems to me, that all persons having quail in their possession in this state, either dead or alive, enroute from a hunting trip without the state, although the quail which they have with them were lawfully taken in such state, they are so doing in violation of the Game Code. Consequently, I think, and you are so advised, that quail, a non-game in Ohio, cannot be possessed or transported, either dead or alive, at any time in this state.

Respectfully,

C. C. CRABBE,

Attorney General.